UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CITY OF WARREN, individually and on behalf of all others similarly situated ,

Plaintiff,

v. 20 Civ. 2031 (RK)

WORLD WRESTLING ENTERTAINMENT, et al.,

Oral Argument

Defendants.

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New York, N.Y.
July 30, 2020
4:00 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

LABATON & SUCHAROW LLP
Attorneys for Plaintiff
BY: CAROL CECILIA VILLEGAS
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K&L GATES LLP
Attorneys for Defendants
BY: STEPHEN GREGORY TOPETZES

(The Court and all parties present telephonically)

THE COURT: This is Judge Rakoff. Would counsel please identify themselves for the record.

MS. VILLEGAS: Good afternoon, your Honor. You have Carol Villegas from Labaton Sucharow on behalf of the lead plaintiffs and the class.

THE COURT: Good afternoon.

MR. TOPETZES: Good afternoon, your Honor. Steve Topetzes from K&L Gates on behalf of all of the defendants.

THE COURT: Good afternoon.

We're here on oral argument on the motion to dismiss. Let me hear first from moving counsel, then from responding counsel.

MR. TOPETZES: Thank you, your Honor.

We start by focusing on the PSLRA and its two pillars: falsity and scienter. The cornerstone of the story plaintiff attempts to stitch together is the purported "deteriorating relationship between WWE, World Wresting Entertainment, and the Kingdom of Saudi Arabia." I'd like to speak to that, as well as the subject opinion statements and the use of confidential witnesses in this particular case, all of which demonstrate plaintiff has failed to make a particularized showing with respect to falsity. Then I would like to turn to scienter, which we respectfully submit presents a discrete and straightforward issue in this case because the complaint is

utterly devoid of specific allegations giving rise to a strong inference that defendants acted with intent to deceive.

With respect to this central thesis of a deteriorating relationship, plaintiff contends that the statements by defendants were false and misleading because there was a deteriorating relationship that included "growing tensions such that things were 'boiling over' and the parties were 'embroiled in conflict.'" Based on those assertions, plaintiff says no reasonable person could believe that a media rights deal for the Middle East-North Africa region, the MENA region, could occur. Your Honor, all of that is pure speculation. There is no particularized allegation --

THE COURT: I thought the gist of their complaint, so far as falsity was concerned, was that, first, OSN had informed WWE in November 2018 that it would not renew the agreement between them which, according to plaintiffs, was an important negative development that needed to be disclosed, but it wasn't disclosed until months later. And second, that when it was disclosed, WWE tried to, in effect, blunt the negative impact by simultaneously announcing that it had secured an agreement in principle with the Saudi government for an agreement, a media agreement, that would be completed very soon when, in fact, according to plaintiffs, there was no such agreement in principle, let alone something that would be completed very soon.

So that's what I've understood to be the heart of the allegations regarding falsity, the failure to disclose the early termination of the first agreement and then in conjunction with its disclosure months later, the misrepresentation, alleged misrepresentation, of the status of the negotiations with the Saudi government.

MR. TOPETZES: Your Honor, if I could just address both pieces of that?

THE COURT: Yes.

MR. TOPETZES: To put OSN in context and, again, with reference to things of which the Court can take judicial notice here at the initial pleading stage, in its Form 10-K for 2018 which was filed in early February 2019, the company stated that it had a number of media rights deals that were "nearing the end of their terms." So in terms of the significance of OSN, public disclosures reflect that of the company's more than half a billion dollars in media rights deals, overwhelmingly it's focused on U.S. distribution, only 79 million was up for negotiation at that time. And it's also clear that of that 79 million, the two largest pieces involved the UK and India. Public disclosures did not reflect specifically where the MENA region was ranked with respect to the distribution, but it's important to note that OSN -- it's lower than the UK and India which were taking up the largest parts of that 79 million, but it's clear that OSN was just the pay TV distributor in the MENA

region. NBC, which was a Saudi entity, was the partner with respect to free TV. We submit, with respect to that alleged omission, that there are no particularized facts that provide evidence that the omission was misleading, material, or deceitful in any way. As to the agreement in principle --

THE COURT: Whoa, excuse me. I think you're lumping together two different things there. Whether it was deceitful is one issue; whether it is material is a separate issue. Ultimately, plaintiffs, of course, would have to show both. I'm not as clear that they have to show materiality at this stage to the same heightened degree that they have to show falsity.

MR. TOPETZES: Yes, your Honor, and that's why we focused on the falsity. The statements by the company, the alleged misstatements or misleading statements that contained omission, talked in terms of markets, and the marketplace understands that the company's media distribution arrangement, or media rights deals, come and go. Sometimes you renew or you enter an agreement with an existing partner. Sometimes you find a current -- a new partner, and we've provided some examples of that. We don't think there was any falsity with respect to the identified statements, and plaintiffs have not identified or alleged anything that's particularized with respect to why the statements made by the company were false.

As to the deteriorating relationship piece, which goes

to the agreement in principle, I started to say the complaint is devoid of particularized allegations that support any of it relative to the falsity of the statements concerning the agreement in principle. There's no internal document. There's no reference to a meeting or discussion. There's no confidential witness who had any interaction with the defendants or who was involved in discussions between WWE and Saudi Arabia. Instead, plaintiff offers two confidential witnesses, neither of whom had direct interaction with defendants. Plaintiff cites selectively to portions of three declarations, three of six declarations, provided to it when it was served with a Rule 11 motion. Plaintiff makes a conclusory assertion regarding late payments without any specifics, and plaintiff cites to "news reports" that appeared on Internet wrestling websites that travel in gossip and multiple layers of hearsay and unverified statements from Twitter accounts, social media postings.

In contrast to that, Judge, we submit there are facts of which the Court can take judicial notice at the initial pleading stage that cut squarely against any inference of a deteriorating relationship. In fact -- and this goes to the falsity with respect to the agreement in principle and this, we submit, manufactured notion that the defendants were trying to blunt the fallout from OSN, which, incidentally, the Court can observe the context of analysts and Wall Street coverage of the

company, none of which was particularly focused or not focused at all on OSN -- the relationship between WWE and Saudi Arabia expanded during the relevant period. It's important to note, Judge -- and our concern might get lost in the smoke screen plaintiffs are trying to create here -- the company in July of 2019 announced two agreements in principle with the Kingdom of Saudi Arabia. One -- and both of them in a nonbinding form on broad terms. One of the agreements in principle pertained to live events. That was the bigger piece revenue-wise, and that's the piece on which analysts and the markets seized for the most part. The second was a media rights deal. One of those two agreements in principle happened. It was finalized. It was announced in September of 2019. The company had another live event in Saudi Arabia in 2019 and still another event earlier this year, in February of this year, in a pre-COVID-19 environment.

Plaintiff focuses on the October 31, 2019, Crown Jewel event at which plaintiff claims tensions were boiling over such that there was a cut feed and a hostage situation relative to the return trip for WWE wrestlers and others. The public record, Judge, reflects that two business days later, on the following Monday, November 4, 2019, WWE announced an expansion of the relationship with the Kingdom of Saudi Arabia to include two live events annually through calendar year 2027. So focusing on the falsity of the statements with respect to the

agreement in principle, far from a relationship deteriorating, boiling over, and embroiled in conflict, the facts give rise to a stronger inference that the relationship was growing. The facts also cut against the suggestion by plaintiff that no reasonable person could have believed that a deal would be completed, something they repeat over and over in the complaint. The more plausible inference is that the defendants, we submit, honestly believed their optimistic opinions which were caveated and which were updated throughout the period.

I'd like to talk a little bit about those opinions, and I know the Court is deeply experienced regarding all of these issues, and make two threshold observations. The first is this is a fraud by hindsight case squarely. Plaintiff's theory is no deal happened, so it must have been fraud when you expressed optimism or made your statements concerning your efforts to obtain a deal. The other thing is that the statements on which plaintiff is focused largely are opinion statements. As the Court is well aware, under *Sanofi* and *Omnicare* related cases, the statements are only actionable if the belief was not sincerely held or if the speaker omits information, which omission makes a statement misleading to a reasonable investor.

With respect to this point, the character of the statements, I direct the Court to the language used by the

company in its discussions and negotiations -- regarding its discussions or negotiations with Saudi Arabia. Defendants told the marketplace that discussions are ongoing, and the potential deal is termed something that the company is still working on. WWE stated that it believed it had agreements in principle, in principle on broad terms, while making clear that the understanding is nonbinding and that ultimate agreement may not occur. The company then went further, Judge, and informed investors that if a deal did not occur, a likely downside would be an adjustment to its OIBDA, operating income before depreciation and amortization.

THE COURT: So I agree with you that there are aspects of opinion in that, but there's also a factual assertion. If, for example -- let's take a hypothetical, not this case -- but if, in fact, two parties to a negotiation had said to each other: "We're nowhere near an agreement. We disagree on fundamental terms, but let's continue talking," and then one party thereafter said, "The parties have reached an agreement in principle on broad terms," why wouldn't that be a false factual statement?

MR. TOPETZES: It might be, Judge, and it might be actionable or enough to survive this stage if it was supported by particularized allegations. There are no specific allegations of any type regarding -- from people with firsthand knowledge regarding the character or the state of the

negotiations.

THE COURT: OK.

MR. TOPETZES: The complaint --

THE COURT: I'm sorry. Go ahead.

MR. TOPETZES: No, I apologize, your Honor.

THE COURT: No, no.

MR. TOPETZES: The complaint is devoid of factual allegations, let alone particularized ones, that indicate defendants did not believe the opinions contained in the alleged statement.

THE COURT: My point was -- is the statement "we've reached agreement in principle" is partly a statement of an opinion but partly a statement of fact. You're saying that the falsity of that, of the portion that is a statement of fact, is in this complaint, according to you, not alleged with factual particularity sufficient to meet the requirements of the PSLRA and Rule 9(b). So I understand that argument.

Now, you wanted to also talk about scienter?

MR. TOPETZES: I do, Judge. I also -- I did want to talk about the confidential witnesses, but I'm happy to jump to scienter.

THE COURT: No, go ahead. No, go talk about the confidential witnesses.

MR. TOPETZES: As the Court is aware, well aware, confidential witnesses are a fact of life and an element of

this type of litigation which is lawyer-driven, and I know your Honor is deeply experienced on all of these issues. Respectfully, your Honor, we submit the confidential witness presentation is especially thin and inadequate in this case. Neither confidential witness alleges any connection to or interaction with any defendant. There are no specific allegations forced by a confidential witness regarding any communication with a defendant, any internal document, communication or meeting or any purported disclosure statement, events or matter or other matter or thing that creates a strong inference that defendant did not believe any of the subject statements.

Confidential witness No. 1 was not directly involved in negotiations or discussions between World Wresting Entertainment and Saudi Arabia and offers nothing as to what the defendants knew. He arrived later in the fall of 2019, so he is in no position to comment on veracity or state of mind questions connected to the company's July 25, 2019, statement. Rather than present the confidential witness with relevant firsthand knowledge, plaintiff makes sweeping and, we believe, unpersuasive assertions in its opposition. Among other things, plaintiff says at page 18: CW-1's allegations made clear that there could not have been an agreement in principle in July 2019. Why? How does that conclusory assertion reflect a particularized allegation of fraud?

Your Honor, we submit courts historically and consistently have required much more. CW-1 was not at NBC. And I note, and we highlight this in our reply, the company announced an agreement in principle with the GSA, which is another Saudi -- General Sports Authority, and was negotiating and working with the General Entertainment Authority. There's no mention of NBC. CW-1 worked at NBC, but he was, in any event, not at NBC during the time that the announcement was made with respect to the agreement in principle.

Plaintiff then makes the following assertion, and this is truly sweeping: Based on the way negotiations work at NBC -- again, not the party with which WWE announced an agreement in principle -- and WWE were far apart in the fall, there's no way WWE could have believed it was close to a deal in the summer with GSA. Again, why, your Honor? And how does that sweeping unsupported assertion reflect a particularized allegation of fraud? It is incumbent on the plaintiff to plead fraud with particularity.

The same is true regarding CW-2, purportedly a former wrestler. He offers, for the most part, a personalized perspective regarding a scene at the airport in Saudi Arabia following the Crown Jewel event on October 31, 2019, a circumstance that allegedly involved a hostage situation. Again, CW-2 offers nothing regarding what any defendant knew, understood, said, or was told regarding any relevant matter or

thing connected to the relationship between WWE and the Kingdom of Saudi Arabia. Your Honor, respectfully, this is not *City of Pontiac Retirement System v. Lockheed* or any number of other cases where confidential witnesses provide a plausible basis to permit a case to go forward. In *Lockheed*, your Honor was presented with six confidential witnesses who provided detailed allegations with respect to personal conversations, direct interactions with defendants, and --

THE COURT: I take it with respect to CW-1, what I took away from the papers was that CW-1 was involved in a later stage of the negotiations and concluded that the parties at that later stage were, I think the term was, "worlds apart." And then the argument from plaintiff's counsel is that if they were worlds apart months later, it stands to reason that they could not have reached an agreement in principle months earlier.

So what about that?

MR. TOPETZES: There's nothing about the opinion or the assessment of CW-1 that ascribes -- that can be ascribed to any of the defendants. CW-1 doesn't offer insight with respect to the negotiations, had no communications with any of the defendants, is not reporting with respect to communications with the defendants. CW-1 speaks in terms of an internal to NBC -- again, not the party with which the corporate defendant announced an agreement in principle -- but an internal to NBC

study regarding subscriber levels. None of that is particularized with respect to the state of mind of any of the defendants and whether they believe their statement.

Unlike other cases, and the plaintiff cited *Lockheed*, there's no texture here, Judge. It's missing from the allegations in the consolidated amended complaint, or as the Second Circuit termed it recently in a case *Jackson v. Abernathy*, which was decided about two months ago in late May, there was connective tissue in *Lockheed*, for example, between a witness statement and the alleged misstatement by the defendant. There is no connective tissue here, your Honor, not in this very lengthy consolidated amended complaint. There's nothing that charges any of this to defendants in terms of their knowledge, their having received contrary facts. The defendant Wilson, there's nary a mention of her with respect to all of the pages of the complaint that talk about the alleged deception and the statements. She's listed as a participant on earnings calls or conference calls with analysts or media representatives, but none of the statements is attributed to her that are allegedly misleading.

With respect to scienter, the Court again is very familiar the PSLRA requires the plaintiff state with particularity facts giving rise to a strong inference that defendants acted with the requisite state of mind. Here, plaintiff's allegations lack any ties to defendants and what

they actually knew. There are no specific allegations regarding instances where defendants received contrary information. Again, Judge, the complaint is devoid of references to internal reports or documents, insider accounts, communications involving any of the defendants or a description of any meeting or discussion during which adverse facts were provided, communicated, or established. Under Dyn- --

THE COURT: Well, in the first group of allegations relating to the undisclosed early termination of the agreement, assuming for the purpose of assessing scienter that that ought to have been disclosed and that the failure to disclose it was misleading, how could it not be that the defendant knew and chose not to disclose it by the nature of the allegations there? Moreover, there's the allegation that because the purpose was to keep the price of the securities high, then at least one of the defendants sold a substantial amount of stock during that period. So I'm not clear as to the first set what more you think is necessary.

MR. TOPETZES: Your Honor, speaking in terms of scienter, with respect to the OSN early termination, there's nothing that ties the facts surrounding that to the defendant. Yes, it involved the corporation. And I do want to get to these collective scienter, corporate scienter, core operations doctrine theories in which plaintiff seeks refuge in its opposition, but there's nothing with respect to the alleged

omission regarding OSN that is tied to the defendants. There's no statement from an insider. There's no document that reflects that the defendant made a false statement with respect to that because they had contrary information. Again, neither confidential witness is alleged to have interacted with any defendant.

Again, your Honor, we submit the more plausible inference is that plaintiff honestly believed the subject statement and that nothing supports a strong inference of recklessness, something that the Second Circuit in *Novak* described as a state of mind approximating actual intent. Other cases, Judge, where contrary findings have been made at the motion to dismiss stage have consistently and overwhelmingly involved more in the way of particular allegations, particularized allegations, even as to the alleged omission. OSN and its profile in this litigation has morphed and evolved some from the complaints that were originally filed and assigned to your Honor, and now they're inflating it and saying that this was a material omission without providing specific facts related to materiality but without tying that omission to the defendant. Courts have consistently required more that undermine the good faith -- in terms of particularized allegations that undermine the good faith of defendants.

I want to speak briefly regarding these other theories

that they've injected with respect to scienter because in apparent recognition of the gap, the absence of particularized allegations with respect to the defendants, in its opposition plaintiff is seeking, as I said earlier, refuge in notions of collective scienter or corporate scienter and the core operations doctrine. The core operations doctrine, Judge, while not altogether rejected or entirely discounted in the Second Circuit, it is largely disfavored. It's not something on which courts place great weight. As the Second Circuit again said recently in *Jackson v. Abernathy* in refusing the embrace the core operations doctrine, in exceedingly rare circumstances, a statement may be "so dramatic that collective corporate scienter may be inferred," relying on *Dynex*.

Judge, there's nothing about the omission here or the statements with respect to the agreement in principle that rise to that level. Again, the court in *Jackson* said we require connective tissue between the facts alleged or evidence, witness statements, and the alleged misleading statements by defendants. Those elements are absent from the complaint here.

Your Honor, the stakes are always high at this early stage in these cases, as the Court is well aware. So we understandably approach this matters with spirit and with energy because the impact on public companies and their shareholders is so substantial, but we also come to you with principle. This is a strained effort by plaintiff. It is

grounded in innuendo and unsupported surmise and this effort to distort and amplify the OSN arrangement. The company had media distribution deals coming and going routinely over a period of years. It lacks particularity or connective tissue that would support an indicia of fraud. We respectfully submit the claim should be dismissed in their entirety with prejudice.

THE COURT: All right. That was very helpful. Let me hear now from plaintiff's counsel.

MS. VILLEGAS: Thank you, your Honor. Carol Villegas on behalf of plaintiff.

So this case is a little bit unusual in that some of the information we do rely upon are declarations from some of the WWE executives that defendants' counsel provided us with. And I'd like to start with the OSN contract agreements because I think they're very helpful for that part of the case.

There are a lot of facts that aren't in dispute, I think, because we have these declarations from defendants. This is an agreement that was entered into in 2014, and it was supposed to go through the end of 2019. There's some specificity in their declarations about documents that they received from OSN, a settlement agreement, and it was ultimately terminated on December of 2018 with the last effective date of the payments ending on March 2019. So there's no dispute that this agreement ended three quarters early.

I think it's important when we go into the class period to talk about the context of where WWE is. They're in the process of trying to renew and renegotiate a number of international media rights agreements, and part of the reason why the early termination was a material omission was because of how significant these media rights deals are for the company, and they specifically talked about that in the context of the MENA region agreement. If I could just point the Court to a couple of statements that support the fact that this agreement was important, it was something that defendants were focused on, it was something analysts were focused on, and it would have mattered to the market to know that an agreement in a very important region for the market had been canceled three quarters early and that there wasn't going to be an agreement in place.

One of those paragraphs is paragraph 237 of the complaint where defendant Barrios talks about the MENA distribution rights agreement and he says: "Locking those agreements down is obviously important for us strategically because our distributor -- distribution partners for the core content is a key part of value creation for the business, important for us financially."

So based on what he's saying, having these deals in place is important, and if one of these deals is canceled early, that's also important.

Just another statement made by the senior vice president of investor relations also underscores this. At paragraph 253, the senior vice president is specifically talking about the Middle East agreement in particular and says: "So those are coming and important deal for us." He's also referring to the other international deals, but calls out the Middle East specifically and says: "We're not going to talk terms, but there's really interesting elements of those that become really important, the ability to expand reach through elements like free to air, the ability to offer, to commit our partners to localized content, really important. That helps build engagement."

And what they're referring to there is the reach of these agreements in terms of the countries that they affect, and the OSN agreement covered more than 20 countries in the Middle East and in North Africa. So if there's a canceled agreement with no media rights in place for these 20 countries, you're missing out on that engagement and the reach to all of those countries. And that's why we think it's important, that's why the market was focused on it, that's why defendants were talking about it, and that's why it would have mattered to investors to know that this agreement was canceled three quarters early.

One of the other things I'll say is that there are other places in our complaint where we talk about how important

these agreements are in terms of how they affect the live events and the merchandising. I know in defendants' reply they make statements about how the agreement itself wasn't material in terms of revenue, but it really does go beyond just the revenue, your Honor. It goes to this engagement, this reach. It sort of works together and in concert so that when you have these media agreements in place, it encourages people to go to live events and also to buy the merchandise. So the media rights deals matter and an early cancellation would also matter.

The other point I would like to make about the OSN deal is the April 25, 2019, disclosure where the stock price goes down, and we talk about this because this is really a materialization of the undisclosed risk that this agreement was canceled early. And what happened on this date is that defendants missed consensus estimates. Analysts had a consensus estimate of $40 million, and analysts had no idea that this agreement had been canceled. So in their minds, it's the status quo. They're just baking in what we think is happening, this agreement's going to go on until the end of 2019. So at least part of that miss, we allege, is a materialization of the undisclosed risk that this agreement had been canceled early.

Again, Your Honor, I'm happy to go through some of the false statements just to show how they were specifically

referring to the MENA region and why it would have mattered to investors to know that the deal had been -- the agreement had been canceled early, but the point is that this was really giving the market a sense of facts that didn't exist. They were operating under the impression that this agreement was still in place, and that's what makes it false and misleading.

As to the OSN deal, your Honor is correct, we don't really rely upon confidential witnesses for the earlier part of the case. The scienter aspect of the OSN deal being canceled early is pretty simple. We have declarations from high-level employees of the WWE describing for us in great detail that the deal was canceled early, that OSN sent a letter to WWE, that WWE sent them a letter of material breach, that there was a settlement agreement that was negotiated. And so our position on the OSN agreement is that defendants certainly had access to this information to know that the OSN deal was canceled, that coupled with the fact that everybody was focused on the region at the time.

And as your Honor mentioned, another important point about what was happening in this first part of the year, the first part of the class period, are the stock sales by defendant McMahon. And when you look at these sales, these sales are very large. He sells an incredible amount of stock, $261 million. And the timing is particularly interesting because it's four days before the close of the first quarter,

and the first quarter actually underperforms. But you also have this canceled agreement and no other agreement in place for the rest of the year at that point.

Now, I know defendants want you to look at this Form 8-K that says he sold shares so that he could enter into a venture called the XFL football league, but the case law says a proposed innocent explanation for stock sales are facts that are in dispute and not appropriate for a determination on a motion to dismiss. At the time he made this trade, he knew there was nothing in place to fill the revenue gap or he was at least reckless in not knowing, but our allegations are that he knew. So we think this provides a very strong inference of scienter as to defendant McMahon. And there are, of course, other indicia of scienter for McMahon and the other defendants, and I can get to that later, but at least for defendant McMahon around this time we think the insider trade made with knowledge of material nonpublic information is suspicious and supports scienter.

So just moving on to the agreement in principle statements, we get to July 2019, and defendants tell the market a few things. They do finally admit that the OSN deal is canceled, but as your Honor recognized, they blunt the news by telling the market that they have what they believe to be an agreement in principle with Saudi Arabia to replace this deal, and they tell the market that they expect that it will close

very soon. They also say that meeting their OIBDA, which is an important financial metric for the year, was dependent on the MENA media rights deal closing as well as having a second live event in Saudi Arabia. Again, this just goes to show you how important it is to have a deal in place and that a canceled deal would matter.

But just getting to the falsity of the statements, they say "we believe we have an agreement in principle," and I'll get to whether this is an opinion statement in a minute. But in the first instance, I agree with your Honor that this is a present sense fact statement. So this present fact statement doesn't get any safe harbor protection. We have an agreement in principle actually means something. The case law says it means we have a deal on structure and price, and defendants don't dispute this in their reply.

So why is this false? Well, we talked a little bit about the confidential witness who worked at NBC on this feasibility study, and I think if you look at the allegations that this CW provides us, they're very specific. The CW gives us numbers. He tells us just how far apart they were in terms of the licensing fee. He says that the WWE was first at 80 million and then they went down to 50 million, but that NBC was not going to go above 14.5 million. So they were still far apart in the fall. And WWE had their subscriber numbers at 100 million, while NBC was at 6.5 million, and they only raised

it to 15 million to be cooperative.

So you have a witness who is working on a feasibility study to determine the feasibility of its media rights agreement between the WWE and NBC providing us with very specific details about the work that he did. Now, it's true that this witness did not have any direct contact with any of the defendants, but it's not the standard in this circuit, your Honor, that the witness has to have a direct communication with the defendant for his information to be probative of scienter or falsity. In this case, as you mentioned, this CW was involved in the later stages of the negotiation. That's what we allege. And what we're asking the Court to do is to give us an inference that if later in the negotiations they were still far apart, that earlier in the negotiations they weren't any closer, and we believe we're entitled to this inference and that it's a logical inference based on the information that we have provided.

So we also believe that the information that this witness provides goes to the falsity of the agreement in principle. And if you don't have an agreement on the number of subscribers or the licensing fees, then you don't have an agreement in principle because you don't have an agreement on the deal structure and the price.

Now, I want to turn to talk a little bit about whether this is an opinion statement or not, "we believe we have an

agreement in principle." There's obviously case law that says just because you put the words "I think" or "I believe" in front of a statement, that doesn't make it an opinion statement, and that's certainly our position here, especially since whether there was an agreement in principle is an objectively verifiable fact.

Defendants claim that they actually believed the statement. Well, *Omnicare* itself is actually helpful for us here in this situation. It says: "That defendants may have believed their statements to be accurate is irrelevant even when read as an opinion statement. So core inquiry when determining whether an omission renders a misleading is whether the omitted facts conflict with what a reasonable investor would take from the statement itself."

So here we have the omitted fact, which is just how far apart they were in terms of price and structure months later juxtaposed with the statement "we believe we have an agreement in principle," making it false, so this statement would still be actionable. And we also allege that even the guidance they gave that was dependent on the media rights agreement being completed is also actionable. They claim that their OIBDA guidance of 200 million was dependent in part on the MENA media rights deal that they had an agreement in principle for. And we look to the *Aéropostale* case where Judge McMahon said plaintiff does not need to rely on the falsity of

defendant's financial projection in order to show that they failed to disclose facts that impacted the reliability of those statements, and the safe harbor and bespeaks-caution doctrine do not apply to these omissions.

I'd just like to address the risk language that defense counsel talked about when they said we have an agreement in principle, but you know we're not sure what's going to happen. So, to be clear, we're not alleging that this particular risk language in July is false. We're saying it doesn't matter because "we have an agreement in principle" isn't a forward-looking statement, so the risk language can't protect them. And as I mentioned before, the case law actually defines an "agreement in principle" as having an agreement on the price and structure. So we're also not talking about a puffery statement either.

Of course things happen. Of course you could have an agreement with someone or think you have an agreement. It might be breached in the future. But, again, that's not what we're talking about here. I like your hypothetical, your Honor, because it's a hypothetical I was also thinking about when preparing for this argument, which is defendants don't say something like, "We believe we will have an agreement in principle next quarter." They say, "We believe we have an agreement in principle," meaning now. That was a statement of present fact, an agreement on price and structure, when there

was no agreement on the price and structure, and so we contend that this is actionable even despite the risk language.

If I could just turn to scienter on the agreement in principle point, I've already talked a little bit about the confidential witness No. 1 who provided us information about the feasibility study that he prepared and specifics on the numbers. And again, your Honor, it's in the papers. I'll admit he didn't have any direct contact with defendant McMahon, but he really doesn't need to because when you look at all the other allegations in the complaint, we detail how important this new media rights agreement was for the company. They tied their full-year guidance to completion of the deal. They touted the importance of WWE's relationship with the Saudi government. When you look at these facts collectively and holistically, this supports defendants' knowledge of the negotiation or that they were extremely reckless in making statements that they had an agreement in principle if they didn't know that they were so far apart in terms of the deal.

Now, we also allege -- have allegations based on confidential witness No. 2. He's a former wrestler who corroborates some reports that the conflict between defendant McMahon and the Saudi Crown Prince was caused by these delayed Saudi payments. Now, I just want to make sort of a broader point that I think defendants are looking at our allegations a bit too narrowly by saying that all of our allegations are

based on a deteriorating relationship. This is a part of the complaint, but it's certainly not the main thrust of the complaint. But at least as to this wrestler, he does provide very specific facts based on his present sense impressions of being on the plane, in the room, and having a conversation with WWE's senior director of talent, Mark Carrano, and that person told him that the Crown Prince and McMahon had gotten into an argument over these late payments, that McMahon had cut the live feed, and that that had made the Crown Prince very mad. I mean, this allegation also supports that McMahon was directly involved in the Saudi relationship and that he knew about the late payments.

Now, I know defendants say this is all based on hearsay, but part of his allegations are based on a person he names, Mark Carrano. So we know where it came from, and he gives us very specific details about what mark Carrano told him. And the Court is allowed to rely on hearsay. In preparing for this argument, it also occurred to me that this might not even be hearsay. This could potentially be a statement made by a party's agent pursuant to Rule 801, and of course, we would probably need discovery to find out if he was making it in the scope of his employment. But at least at the pleading stage, he is the senior director of talent; it was his job to deal with talent. So I would submit, your Honor, that these two confidential witnesses have provided information that

can be relied upon because they -- the information is based on their positions and the fact that they would be in a position to possess the information that they provided us with.

Some of the other allegations that we have as to scienter, as I mentioned before, are based on defendants' own declarations. And we also provide information about stock sales as to defendant McMahon, which I discussed. And as to the other defendants, we believe their stock sales were suspiciously timed, and even though the amounts were not so different from the control period for Barrios and Wilson, the percentages were. So we think the Court should consider these trades holistically along with other scienter allegations against those defendants. We think it provides just another data point.

So in addition to the declarations, the confidential witnesses, the trading, we do ask the Court to rely on the core operations doctrine. In this case we think it makes sense for several reasons. Defendants touted growth from the media rights agreements, including the MENA region. They talked about how important these were strategically and financially for the company. They spoke about finalizing the agreements. They spoke about negotiating the agreements. They said the MENA region was important and that it had become the company's second largest market by monetization. Their full-year guidance was dependent on finalizing this MENA agreement.

That's how important it was. And the live event partnership with the Saudi government generated a lot of money for the company, meaning that defendants paid close attention to WWE's relationship with the Saudi government. So we do think it would be absurd to suggest that defendants did not have this knowledge given the importance of the MENA region media rights agreement and the WWE's relationship with the Saudis.

Also, defendants made very specific statements about the supposed agreement with the Saudis, including that the parties had an agreement in principle that would be announced very soon. This provides strong circumstantial evidence that they were receiving some form of specific information in order to make those statements.

So we believe the more plausible inference here, your Honor, is that defendants knew about the OSN agreement and they didn't tell the market until they told the market that they had an agreement to replace it, maybe, to keep the stock price up and that this case should be sustained.

THE COURT: All right. Well, that is all very helpful. I will hear briefly from defendants' counsel in rebuttal.

MR. TOPETZES: Thank you, your Honor.

First of all, your Honor, I want to focus on the statement made by the company in July, on July 25, 2019. The company said it believes it has agreements in principle with

the Saudi General Sports Authority on the broad terms for the latter two items, live events and media rights. However, this understanding is nonbinding. It is possible that either or both of these business developments do not occur on expected terms and/or that engagement does not improve as assumed. The company has evaluated these potential outcomes and currently believes that the most likely downside to its adjusted OIBDA would be approximately 10 million to 20 million below its current outlook.

As the Court is aware, a central focus for your Honor is what a reasonable investor would have understood. We submit, your Honor, that a reasonable investor would have understood that there was uncertainty regarding the prospects for a MENA distribution deal given the language used by the company concerning its ongoing discussions with respect to a nonbinding arrangement on broad terms. I won't cover this at length now. It's covered in our papers. The statements are surrounded by meaningful cautionary language, not just boilerplate or the type found to be wanting in some other cases; language that talks about the risks of securing, or to use the exact language of the company, entering, maintaining, and renewing media rights deals as well as the risks associated with transactions in international markets and the risks associated with live events. The marketplace, your Honor, understood that delays and uncertainty and changing partners

with respect to distribution was not unusual for World Wrestling Entertainment.

We provided the Court with information reflecting that the company expressed optimism with respect to its media rights deal in the UK and having a deal there before the end of calendar year 2018. That deal was not finalized until our class period in 2019. The company also expressed optimism concerning a media rights deal for India early in 2019. That deal was not finalized until the early part of this year, in late March 2020. The marketplace understood the statements the company was making.

With respect to questions about whether a risk had materialized and plaintiff's assertion with respect to the financial impact of the OSN early termination, there's no -- it's pure speculation, Judge. There's no statement that ties the company's financial reporting to the OSN termination. There's nothing that plaintiff's counsel noted that the company fell below analyst estimates with respect to the first quarter of 2019 where the MENA -- where, excuse me, the pay TV piece, the OSN arrangement, was still being paid throughout the close of the quarter. None of that is tied by definition to the OSN termination. And plaintiff's assertions with respect to the going-forward financial impact are all speculation. There's nothing that says quantitatively there was an impact on the company's business results. Again, OSN pertained just to pay

TV in that region. The larger piece is the free on air, and that was reflected in the statement by defendant Barrios that plaintiff's counsel read.

I want to address a couple other factual things and then the stock sales, your Honor.

THE COURT: Go ahead.

MR. TOPETZES: First of all, these assertions with respect to delayed payment, the one point I'll make -- and it's indisputable and they've acknowledged it -- is that this payment that supposedly led to the cut feed and maybe produced this alleged hostage circumstance, all of these things that plaintiff has manufactured, that payment was made before the event on October 31, 2019. That was something that was publicly disclosed by the company prior to the event. So these statements that are attributed to Mr. Carrano by confidential witness No. 1 don't follow as a matter of logic, in part because that payment was made. They are hearsay, multiple layers of hearsay, and there's nothing regarding the statement attributed to Mr. Carrano. Even assuming he said it, with presumptions running in favor of the plaintiff as nonmovant, there's nothing about that statement that says anything about defendants' state of mind in making the subject statement. Plus we note, your Honor, that two business days later, the company and the Kingdom of Saudi Arabia announced an expansion of their relationship.

With respect to the stock sales, very quickly, and we've addressed this in our papers, Mr. McMahon's stock sale was a very public circumstance and involved a small percentage of his overall shares available to sell. Again, there's no specific allegation in the complaint that charges him with knowledge of omitted facts. But in any case, with respect to his stock sale, this was a well-known circumstance. It occasioned a Form 8-K filing by the issuer which stated what he intended to do with the money and which also stated that he did not intend to make additional sales. The sale was, as Ms. Villegas pointed out, connected to his public plan to launch the XFL, a new sports league which was later launched and which attracted a following in the days leading up to the COVID-19 crisis.

All of these matters are public. None of that is suggestive of fraud, and none of it is supported by particularized allegations that Mr. McMahon knew any of the statements were false. We cited the Court to cases where larger stock sales in terms of percentage have been determined not to be problematic, not to be a basis for a finding of scienter, or when large sales by one defendant are deemed not to be enough to carry the scienter burden of plaintiff with respect to sales not only by that defendant but by the other defendant.

As to the other two, Mr. Barrios' sales are pursuant

to a 10b5-1 plan. That's something of which the Court, we submit, can take judicial notice as reflected in Exhibit 30 to the declaration that accompanied our opening brief. The Form 4 filed with the SEC reflects the sales were pursuant to a Rule 12b-1 plan. And there's nothing unusual or uncharacteristic regarding Ms. Wilson's sale which was in like amount, it left proceeds, but like amounts to her sales in the prior cycle. We submit none of that is suggestive of a strong inference of scienter, particularly in this circumstance, Judge, where there's no connective tissue. There's nothing that ties these defendants to any of the alleged misstatements or that creates intent to deceive. This is core operations and corporate scienter without any particularized allegations to support it, and it's a distorted amplification of the OSN, opportunistic amplification of the OSN arrangement.

THE COURT: All right.

MR. TOPETZES: I don't have anything further at this time, Judge. Thank you very much.

THE COURT: I want to thank counsel for both sides. This has been a very helpful and well-presented argument. I am still wrestling with some of the issues you've argued, but I will get you at least a bottom line decision on this motion by the end of August, hopefully a full opinion by then, but certainly at least a bottom line ruling. And of course, the case will remain stayed until that ruling comes out.

So, again, my thanks to counsel, and the matter will remain *sub judice*. Thanks very much.

(Adjourned)